APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JANUARY 29, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20593
(Summary Calendar)

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture,

Debtor,

FERGUS M. GINTHER; ADRIANA N. GINTHER

Appellants,

versus

THE GINTHER TRUSTS, A Texas Joint Venture;
REDSTONE EL DORADO ACQUISITION, L.P.,

Appellees,

Appeal from the United States District
Court for the Southern District of Texas

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

Appendix A

PER CURIAM:

Appellants Fergus and Adriana Ginther contend that the District Court erred in dismissing as moot their appeal of the bankruptcy court's authorization of the sale of the undivided interest of the Ginther Trusts, a Texas joint venture ("the Venture"), in the El Dorado Ranch ("the Ranch") to Redstone El Dorado Acquisition, L.P. ("Redstone"). The Venture owned, in the aggregate, approximately 51% of the undivided interest in the Ranch, a real estate development in Texas, and joined all other owners of fractional interests in selling the Ranch to Redstone. As the Venture was then a debtor in bankruptcy, it did not sell its fractional interest in the Ranch until after it obtained authorization from the bankruptcy court pursuant to 11 U.S.C. § 363(b). Appellants contended in bankruptcy court that the sale should not have been authorized because, *inter alia*, the Venture lacked standing to become a debtor in bankruptcy. Appellants also asserted — for the first time on appeal to the district court — that Redstone was not a good faith purchaser. Because, however, (1) the sale was authorized by the bankruptcy court, and (2) Appellants were unable to obtain a stay of the sale, we affirm the district court's dismissal of this appeal as moot.

I. *Facts and Proceedings*

In the 1950s, Noble C. and Minnie Lee Ginther, husband and wife, acquired the Ranch, a 2033 acre tract of Texas real property. Thereafter, it was developed into the el Dorado Ranch and El Dorado Country Club. They sold factional interests in the Ranch, retaining approximately 51 percent in undivided ownership.

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In the mid-1980s, the Ginthers ("grantors") created the Ginther Revocable Trust, a revocable *inter vivos* trust, to which they transferred their interest in the Ranch. The trust agreement provided that, on the death of the first grantor to die, the trustee would divide the assets of the trust into two separate shares, not necessarily equal in value, one share to hold the property of the surviving grantor, the other share to hold the property of the deceased grantor.

In accordance with that provision of the trust agreement, on the death of Noble C. Ginther in 1989, the trust's 51 percent interest in the Ranch was divided into two separate shares: The decedent's undivided 24.7 percent interest went into the Noble C. Ginther Grantor Trust and the survivor's undivided 26.7 percent interest went to the Minnie Lee Ginther Grantor Trust. These trust shares — actually sub trusts — were then placed under the fiduciary control of the Advent Trust Company, as successor trustee of the two grantor trusts that resulted (collectively the "Ginther Trusts").

In 1998, the Venture, referring to itself as a Texas joint venture, voluntarily filed for relief under Chapter 11 of the bankruptcy code. In response to a challenge mounted by a number of creditors to the Venture's standing to file for bankruptcy, the bankruptcy court found that the Venture constituted a de facto joint venture under Texas law, that it owned a fractional interest of some 51% to 53% in the Ranch, and that it did have standing as a debtor in bankruptcy court.

The Venture and the other owners of the Ranch entered into an agreement to sell the Ranch to Redstone, subject to the Venture's obtaining the bankruptcy court's approval of

the sale of its interests. Appellants challenged the Venture's record title to the Ranch and attempted to block the sale. They did not, however, challenge Redstone's status as a good faith purchaser until they appealed to the district court.

The bankruptcy court proceeded to approve the Venture's sale of its interest in the Ranch to Redstone as good faith purchaser. Appellants appealed that decision to the district court and then to us, and they sought a stay of the sale pending each appeal. Like the bankruptcy court, however, the district court — and ultimately this court — refused to grant a stay and the sale of the Ranch to Redstone was consummated.

Despite their failure to obtain a stay of the sale, Appellants prosecuted their appeal of the bankruptcy court's authorization of the sale to the district court, which dismissed their appeal as moot because the sale had already been closed. That dismissal is now before us on appeal.

II. *Analysis*

A. Standard of Review

We review *de novo* the district court's dismissal of an appeal from the bankruptcy court as moot.[1]

B. Failure to Obtain a Stay

After the bankruptcy court authorized the sale of the Venture's interest in the Ranch to Redstone pursuant to

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1. *In re GWI PCS 1 Inc.*, 230 F.3d 788, 800 (5th Cir. 2000).

11 U.S.C. § 363(b), Appellants were unsuccessful in their attempts to obtain a stay of the sale, and it closed. 11 U.S.C. § 363(m) provides that a bankruptcy court's authorization of the sale of property under 11 U.S.C. § 363(b) "to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal" cannot be reversed or modified.[2]

Appellants contended, for the first time on appeal to the district court, that Redstone was not a good faith purchaser of the Ranch, making § 363(m) inapplicable. As Redstone's status as a good faith purchaser was not challenged in the bankruptcy court, however, we need not address this issue. "It is well established that we do not consider arguments or claims not presented to the bankruptcy court."[3] We nevertheless note in passing that our thorough review of the record, Appellants' arguments, and the bankruptcy court's well-reasoned opinion, convinces us that if we were to address the good faith purchaser issue we would likely agree with the bankruptcy court's determination that Redstone was a good faith purchaser as a matter of law.

C. Subject Matter Jurisdiction

Appellants also challenge the subject matter jurisdiction of the bankruptcy court by urging that the Venture was not a

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2. 11 U.S.C. § 363(m) (West 2000).

3. *Gilchrist v. Westcott*, (*In Matter of Gilchrist*), 891 F.2d 559, 561 (5th Cir. 1990) (citing *Moody v. Empire Life Ins. Co.* (*In re Moody*), 849 F.2d 902, 905 (5th Cir.), *cert. denied*, 488 U.S. 967 (1988)).

debtor with standing in bankruptcy court. This contention is irrelevant to the instant inquiry, however. In *In re Gilchrist*,[4] we adopted the Seventh Circuit's interpretation of § 363(m) that a failure to obtain a stay is fatal to a challenge of a bankruptcy court's authorization of the sale of property, notwithstanding any questions as to that court's jurisdiction. As the Seventh Circuit had earlier held in *In re Sax*,[5]

> [t]he appellants raise the jurisdictional argument as if it somehow negates or excuses their failure to obtain a stay. It does not. This appeal is moot because [the appellants] failed to obtain a stay, so we cannot reach the question of whether the bankruptcy court had jurisdiction to order and approve the sale . . . . The bankruptcy court made the determination that it had jurisdiction; an issue which it had jurisdiction to decide. . . . That decision stands unless it is appealed properly. . . . Despite the maxim that ['subject matter jurisdiction can be raised at any time,' valid procedural rules cannot be ignored just because the jurisdictional decision is being challenged rather than the decision on the merits.[6]

Moreover, we are persuaded, as was the bankruptcy court, that the Venture's resulting co-ownerships following the

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4. 891 F.2d 559 (5th Cir. 1990).

5. 796 F.2d 994 (7th Cir. 1986).

6. *Id.* at 561 (quoting *In re Sax*, 796 F.2d at 998).

division of the original trust on the death of the first settlor to die is a de facto joint venture under Tex. Civ. Code Ann. § 6132b. Such joint ventures are clearly "persons" entitled to be debtors in bankruptcy court.[7]

III. *Conclusion*

Because Appellants failed to obtain a stay of the sale of the Venture's interest in the Ranch to Redstone, the district court dismissed Appellant's appeal as moot. The decision of the district court is therefore

AFFIRMED.

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7. 11 U.S.C. § 109(b) (West 2000).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DISMISSING THE APPEAL AS MOOT DATED AND ENTERED JUNE 27, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 00-1295

FERGUS M. GINTHER and ADRIANA N. GINTHER,

Appellants,

versus

THE GINTHER TRUST, A TEXAS JOINT VENTURE and REDSTONE EL DORADO ACQUISITION, L.P.,

Appellees.

ORDER

IT IS HEREBY ORDERED that Appellees' Motion to Dismiss Appeal (Instrument No. 11) is **GRANTED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 27th day of June, 2000, at Houston, Texas.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR STAY PENDING APPEAL DATED AND FILED MARCH 22, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20216

In The Matter Of: GINTHER TRUSTS,
a Texas Joint Venture

Debtor

FERGUS M. GINTHER; ADRIANA N. GINTHER

Appellants

v.

THE GINTHER TRUSTS, a Texas Joint Venture; CREDITORS COMMITTEE, The Official Committee of Unsecured Creditors; REDSTONE EL DORADO ACQUISITION LP; TEBEAR INVESTMENTS INC; NUCORP INC

Appellees

CA-00-925

Appeal from the United States District Court for the
Southern District of Texas, Houston

Appendix C

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for stay pending appeal is DENIED.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DENYING MOTION FOR STAY PENDING APPEAL DATED MARCH 17, 2000

COURTROOM MINUTES

JUDGE Vanessa D. Gilmore PRESIDING

COURTROOM CLERK B. E. Mares

COURT REPORTER Bruce Slavin

LAW CLERK Sorcha Landau

MORNING SESSION 10:30, 12:18

* * *

DATE: 3-17-00

CA H-00-925

Fergus Ginther et al

V.

The Ginther Trusts

Appendix D

DOCKET ENTRY

(VG) Motion Hearing (Rptr — B. Slavin)
(Proceeding)

* * *

Movant's Motion to Stay Pending Appeal is DENIED for reasons as stated on the record.

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED MARCH 1, 2000 AND ENTERED MARCH 2, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663-H4-11
(Chapter 11)

IN RE
THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Debtor

ADVERSARY NO. 99-3058

THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Plaintiff

V.

NOBLE C. GINTHER, JR., ET AL.

Defendants

* * *

Appendix E

FINAL JUDGMENT

On January 27, 2000, trial was held on 1) the Complaint filed by the Debtor, The Ginther Trusts, a Texas Joint Venture, against Noble C. Ginther, Jr.; Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther, III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther, III, Trustee for the Chelsea Leigh Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Nucorp, Inc.; Bobbie Bayless, Receiver; Advent Trust Company, Successor Corporate Trustee of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust, and the Minnie L. Ginther Trust; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Fergus M. Ginther; Adriana Ginther; Erin Lee Ginther; and Stone Mountain Petroleum, LLC (the "Defendants"); and 2) Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. The Debtor appeared by and through its authorized representative and through counsel. The Defendant Nucorp, Inc. appeared by and through its authorized representative and through counsel. The Defendants Noble C. Ginther, Jr., Fergus M. Ginther, and Adriana Ginther appeared through counsel. The Official Committee of Unsecured Creditors and Amber Ginther intervened in this proceeding and appeared through counsel. Bobbie Bayless, Receiver of the Estate of Noble C. Ginther,

Sr., Deceased, having no affirmative opposition to the sale, at the request of her counsel was given permission by the Court not to attend the trial. In addition, Tebear Investments, Inc., appeared by and through its counsel of record. Redstone Properties, LLC ("Redstone Properties") and Redstone El Dorado Acquisition L.P. ("Redstone Acquisition") appeared by and through their authorized representative and through counsel. After consideration of all evidence, objections, pleadings, memoranda and arguments of counsel, the Court makes the following findings of fact and conclusions of law and enters this Final Judgment accordingly. To the extent that any findings of fact are deemed to be conclusions of law, they are hereby adopted as such. To the extent that any conclusion of law are deemed to be findings of fact, they are hereby adopted as such:

1. On March 11, 1998, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11. U.S.C. § 101, et seq. (the "Code"). Since the Petition Date, the Debtor has continued to operate its affairs as a debtor in possession pursuant to sections 1107 and 1108 of the Code.

2. As reflected by this Court's Order On Motion to Dismiss, entered June 24, 1998, the Debtor is a de facto joint venture composed solely of the Noble C. Ginther Grantor Trust a/k/a N.C. Ginther Grantor Trust, and the Minnie Lee Ginther Grantor Trust, a/k/a M.L. Ginther Grantor Trust (such trusts herein being collectively called the "Grantor Trusts"). The only property of the joint venture comprising Debtor's bankruptcy estate is its ownership interests contributed by the Grantor Trusts

in or relating to the El Dorado Golf Club, Inc., d/b/a El Dorado Country Club ("EDCCI") and the real estate known as the El Dorado Ranch (the "Ranch") (together with certain personal property and certain claims and causes of action, including but not limited to avoidance actions). The Ranch consists of approximately 2,011 acres of developed and undeveloped real property located in Harris County, Texas.

3. Advent Trust Company, as Successor Trustee of the Noble C. Ginther Grantor Trust a/k/a N.C. Ginther Grantor Trust, owns, of record, a 24.7246639656902765% undivided interest in the surface estate of the Ranch. Advent Trust Company, as Successor Trustee of the Minnie Lee Ginther Grantor Trust a/k/a M.L. Ginther Grantor Trust, owns, of record, a 26.7246639656902765% undivided interest in the surface estate of the Ranch. Together these two interests constitute approximately an undivided 51% interest in the surface estate of the Ranch. That 51% undivided interest has been contributed to The Ginther Trusts, A Texas Joint Venture, which is the Debtor, and constitutes property of the Debtor's estate. The Debtor has the authority to deal with that interest in the Ranch, as well as the equitable title in the Ranch of the persons who are the beneficiaries of the two trusts.

4. The remaining undivided interest in the surface estate of the Ranch is owned of record by approximately fifteen (15) other owners (collectively the "Record Title Co-Interest Owners"), all of whom are Defendants herein. The respective record ownership interests of the

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Record Title Co-Interest Owners in the Ranch are reflected on the Commitments for Title Insurance attached hereto as **Exhibit "A"** and incorporated herein. Intervenor, Amber Ginther does not own a record ownership interest in the Ranch, but claims an ownership interest as well as a homestead interest in the Ranch. Erin Leigh Ginther owns an interest in the mineral estate of the Ranch. For purposes of this Final Judgment, the term "Co-Interest Owners" means Amber Ginther, Erin Leigh Ginther, and the parties listed in Item 3 of Schedule A on each of the Commitments for Title Insurance attached hereto as **Exhibit "A"** and incorporated herein (such parties listed in such Item 3 being the Record Title Co-Interest Owners). The Debtor and the Co-Interest Owners own undivided interests in the Ranch, as tenants in common, joint tenants, or tenants by the entirety. Debtor and the Co-Interest Owners own all of the surface estate of the Ranch and all or substantially all of the outstanding oil, gas and other minerals with respect to the Ranch.

5. All or a portion of the Ranch is leased to EDCCI, which operates the El Dorado Country Club on a portion of the Ranch.

6. In the summer of 1998, Jerry Crawford made a bid to purchase the Ranch at a purchase price of $11,300,000.00. The bid was accepted by the Debtor, subject to bankruptcy court approval and other conditions contained in such bid. Prior to execution of an earnest money contract reflecting the proposed sale, Mr. Crawford assigned his interests and rights in the transaction to Redstone Properties.

7. On November 5, 1998, subject to bankruptcy court approval, the Debtor, as Seller, entered into a Sale and Purchase Agreement with Redstone Properties for the sale of the Ranch. The original Purchase Price (as defined in the Sale and Purchase Agreement) for the Property was $11,300,000.00.

8. The Sale and Purchase Agreement has been amended by First Amendment to Sale and Purchase Agreement ("First Amendment") dated February 1, 1999, Second Amendment to Sale and Purchase Agreement ("Second Amendment") dated April 16, 1999, Third Amendment to Sale and Purchase Agreement ("Third Amendment") dated May 7, 1999, Fourth Amendment to Sale and Purchase Agreement ("Fourth Amendment") dated July 9, 1999, Fifth Amendment to Sale and Purchase Agreement ("Fifth Amendment") dated July 13, 1999, Sixth Amendment to Sale and Purchase Agreement ("Sixth Amendment") dated November 24, 1999, and Seventh Amendment to Sale and Purchase Agreement ("Seventh Amendment") dated January 26, 2000 (the Sale and Purchase Agreement, as amended, herein being called the "Sale and Purchase Agreement").

9. Redstone Properties has assigned its interest in the Sale and Purchase Agreement to Redstone Acquisition.

10. Pursuant to the terms of the Sale and Purchase Agreement, as amended, the total acreage to be sold to Redstone Acquisition is approximately 1,643.94 acres, as more particularly described on **Exhibit "B"** attached to this Final Judgment and incorporated herein, together

with all improvements thereon and all rights and appurtenances thereto (herein the "Property"), for a total Purchase Price of $10,000,000.00.

11. Pursuant to the terms of an Assignment Agreement (as amended) between Redstone Properties and Jerry Crawford, upon (and only upon) completion of the closing of the acquisition of the Property by Redstone Acquisition, Mr. Crawford is entitled to receive a fee of $700,000 from Redstone Properties.

12. Pursuant to the terms of a Fee Agreement between Mr. Crawford and Don J. Davis, Mr. Crawford will pay $350,000 of the $700,000 fee to Don J. Davis.

13. The Sale and Purchase Agreement is conditioned upon the Debtor's obtaining either Ratifications of the Sale and Purchase Agreement by the Co-Interest Owners, or the Debtor's obtaining an Order from the Bankruptcy Court under 11 U.S.C. § 363(h), authorizing sale of both the Debtor's interest and the interests of all non-ratifying Co-Interest Owners.

14. On September 8, 1998, the Debtor filed its Disclosure Statement. On November 24, 1998, the Debtor filed its First Amended Disclosure Statement with respect to its First Amended Plan of Reorganization (the "Amended Plan").

15. The Amended Plan provides for the liquidation of all the Debtor's assets with the proceeds of the tangible assets to be used to satisfy all Allowed Claims in full.

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The Amended Plan is to be funded by the proceeds of the sale of the Debtor's interest in the Property, and is conditioned upon sale of the Property.

16. On February 1, 1999, the Debtor filed its Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. On September 23, 1999, the Debtor filed its First Amended Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363. On October 15, 1999, the Debtor filed its Second Amended Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 (the Motion, as amended by the First Amended Motion and the Second Amended Motion, herein being called the "Motion to Sell").

17. Notice of the Motion to Sell was properly given pursuant to the requirements of Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure.

18. On February 1, 1999, the Debtor filed its Plaintiff's Original Complaint in order to force the sale of the Ranch over the objection of dissenting or non-consenting Co-Interest Owners. On July 14, 1999, the Debtor filed its Plaintiff's First Amended Complaint. On August 16, 1999, filed its Second Amended Complaint, and on October 14, 1999, the Debtor filed its Third Amended Complaint (Plaintiff's Original Complaint, as amended, being hereinafter referred to as the "Adversary Proceeding").

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19. Pursuant to Order Consolidating Motion to Sell with Adversary Proceeding and Setting Pretrial Deadlines, entered April 21, 1999, the Court consolidated the Debtor's Motion to Sell with the Adversary Proceeding.

20. Summons have been issued on the following Defendants, who have been properly served with the summons and a copy of the Complaint: Noble C. Ginther, Jr.; Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther, III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther, III, Trustee for the Chelsea Leigh Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Nucorp, Inc.; Bobbie Bayless, Receiver; Advent Trust Company, Successor Corporate Trustee of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust, and the Minnie L. Ginther Trust; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Fergus M. Ginther; Adriana Ginther; Erin Lee Ginther; and Stone Mountain Petroleum, LLC.

21. Although duly served, Stuart Douglas Ferrell; Stuart Douglas Ferrell, Trustee; Noble C. Ginther III, Trustee for the Fallon Renee Ginther Trust; Noble C. Ginther III, Trustee for the Chelsea Leigh Ginther Trust; Advent Trust Company, Successor Corporate Trustee of the

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NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust and the Minnie L. Ginther Trust; Esther Duff, Executor of the Estate of Gordon A. Duff; Esther Duff, Successor Trustee; Mercantile Bank of Southern Illinois, Successor Trustee of the Wife's Trust and the Residuary Trust Under the Last Will dated October 6, 1987 of Gordon A. Duff; Edmond Lee "Pat" Ginther; Barbara A. Ginther Nelson; John N. Randall; Rosanne Van Dorn Ginther; Marilyn Deshong; Tri-Texas Realty, Inc.; Ferrell Realty Corp.; Erin Lee Ginther; and Stone Mountain Petroleum, LLC. (the "Defaulting Defendants") have failed to file an answer or any pleading constituting an answer and have not entered an appearance. The deadline for filing an answer has passed.

22. The Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. § 157. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(N) and (O).

23. Venue is proper in this Court pursuant to 28 U.S.C. § 1409, as the main bankruptcy case is pending in this Court.

24. Certain Defendants have executed Ratification Agreements, approving and authorizing the sale of the Property pursuant to the terms and conditions of the Sale and Purchase Agreement. Ratification Agreements have been executed by Nucorp, Inc.; Rosanne Van Dorn Ginther; Edmond Lee "Pat" Ginther; Marilyn Deshong; Advent Trust Company, Successor Corporate Trustee

of the NCG Trust; Advent Trust Company, Successor Corporate Trustee of the Noble C. Ginther Trust and the Minnie L. Ginther Trust; Barbara A. Ginther Nelson; and John N. Randall.

25. Objections to the Motion to Sell were filed by Harris County-State of Texas, the Texas Natural Resource Conservation Commission, Noble Ginther, Jr., Fergus and Adriana Ginther, and Tebear Investments, Inc.

26. Answers to the Adversary Proceeding were filed by Noble Ginther, Jr., Stuart Douglas Ferrell, and Fergus and Adriana Ginther.

27. Amber Ginther filed a Motion to Intervene, claiming ownership and homestead interests in the Ranch. In the Motion, Amber Ginther asked to intervene as a party in support of the sale, subject to Court approval of the Settlement Agreement (herein defined). The Court granted the Motion to Intervene by Order entered January 31, 2000.

28. The objections of Noble Ginther, Jr. to the Complaint and the Motion to Sell have been withdrawn pursuant to the terms of a settlement agreement entered into among the Debtor, Redstone Acquisition, Noble C. Ginther, Jr., Amber Ginther, and El Dorado Tract GP, Inc., a copy of which is attached hereto as **Exhibit "C"** and incorporated herein (herein being called the "Settlement Agreement"). Although the Debtor is a nominal party to the Settlement Agreement, no consideration is being paid by the Debtor under the Settlement Agreement.

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29. The requirements of Section 363(b) and Section 363(h) of the Bankruptcy Code have been met.

30. Partition in kind of the Property is impossible due to the variation in the land and the great number of owners of the Property. Accordingly, the requirements of Section 363(h)(1) are met in that partition in kind of the Property among the Debtor's estate and the Co-Interest Owners is impracticable.

31. The requirements of Section 363(h)(2) have been met in that sale of the Debtor's undivided interest in the Property would realize significantly less for the Debtor than sale of such Property free and clear of the interests of the Co-Interest Owners.

32. The requirements of Section 363(h)(3) have been met in that the benefit to the Debtor of a sale of such Property free of the interests of the Co-Interest Owners outweighs the detriment, if any, to the Co-Interest Owners.

33. The requirements of Section 363(h)(4) have been met in that the Property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

34. Pursuant to Section 363(h) of the Code, the Debtor is authorized to sell both the Debtor's interest, and the interests of the Co-Interest Owners, in the Property.

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35. No Defendants have asserted a vested or contingent right in the nature of dower or curtesy. To the extent that any Defendant asserts such a right, the Property should be sold free and clear of any and all such rights.

36. The Debtor marketed the Property in a professional and diligent manner. In exercising its business judgment, the Debtor has acted in good faith and determined that the sale of the Property is in the best interest of the Debtor, its estate, and its creditors.

37. The sale of the Property is in the best interests of the Debtor, its estate, its creditors, and the Co-Interest Owners.

38. The sale of the Debtor's interest in the Property is the best means available for providing cash to satisfy the allowed claims of creditors.

39. The Sale and Purchase Agreement was negotiated in an arms length transaction and in good faith, and the terms and conditions are fair and are equitable and in good faith.

40. Redstone Acquisition is purchasing the Property in good faith within the meaning of Section 363(m) of the Bankruptcy Code.

41. Upon Redstone Acquisition's purchase of the Property, it is contemplating selling a portion of the Property (such portion herein being called the "Johnson Portion") to an entity affiliated with Larry Johnson (such

entity herein being called the "Johnson Entity") for a purchase price of $8,500,000. Redstone Acquisition's sale of the Johnson Portion to the Johnson Entity is in good faith. The Johnson Entity's purchase of the Johnson Portion is in good faith.

42. Pursuant to Section 363(f) of the Bankruptcy Code, the Debtor is entitled to sell both the Debtor's interest in the Property and the interests of the Co-Interest Owners free and clear of any interests in the Property, including but not limited to free and clear of all liens, claims, and encumbrances, except for the Permitted Encumbrances (herein defined).

43. The sale of the Property represents sound business judgment.

44. The Purchase Price of $10,000,000.00 is the highest and best obtainable under present market conditions and circumstances.

45. Time is of the essence with regard to obtaining authorization to consummate the sale. Redstone Properties and Redstone Acquisition have committed substantial resources and reserved substantial capital to undertake the purchase of the Property. Delaying the sale until confirmation of a Plan of Reorganization would result in potential loss of the sale to Redstone Acquisition and loss of a viable purchaser of the Property.

46. In reference to any payments to be received from the sale by either Jerry Crawford or Don Davis, there is

no evidence of bad faith or evidence of unreasonableness with regard to the Debtor's estate. In light of the nature of the Property, the claims against the Debtor's estate, and the parties making claims against the Property, sale of the Property is the absolute best thing that can happen to this Property. In light of that, and the sales price of the Property, the payment of $700,000.00 is reasonable under the circumstances.

It is therefore, **ORDERED, ADJUDGED, AND DECREED** that:

1. The Debtor's Motion to Sell is granted.

2. Final Judgment is awarded in favor of the Debtor in the Adversary Proceeding. The Debtor is authorized to sell to Redstone Acquisition full fee simple title to the Property (including both the surface and mineral estates), which includes both the Estate's undivided interest in the Property and the interests of the Co-Interest Owners in the Property, pursuant to the terms of the Sale and Purchase Agreement and this Order, free and clear of all Encumbrances (herein defined), except for the Permitted Encumbrances (herein defined). Specifically, but without limitation, the Debtor is authorized to sell to Redstone Acquisition full fee simple title to the Property (including both the surface and mineral estates), which includes both the Debtor's undivided interest in the Property and the interests of the Co-Interest Owners in the Property, free and clear of all of the Unacceptable Encumbrances (herein defined). As used herein, the term "Encumbrances" shall mean any and all liens, claims,

leases, mineral leases, outstanding mineral interests, interests, rights, reservations, restrictions and other matters and encumbrances that affect all or any portion of the Property. As used herein, the term "Permitted Encumbrances" shall mean those Encumbrances referred to in (a) items 11, 12, 13, 15, 17, 19, 20, 21, 26, 34, 38, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63 and 66 of Schedule B to that certain Commitment for Title Insurance ("Redstone Title Commitment") issued by Charter Title Company on behalf of Lawyers Title Insurance Corporation, bearing GF No. 98030451, having an effective date of December 29, 1999 and an issued date of January 7, 2000, and (b) items 15, 16, 17, 19, 20, 21, 22, 24, 25, 35, 36, 40, 41, 46, 48, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63 and 66 of Schedule B to that certain Commitment for Title Insurance ("Johnson Title Commitment") issued by Charter Title Company on behalf of Lawyers Title Insurance Corporation bearing GF No. 98030451-B, having an effective date of December 29, 1999 and an issued date of January 7, 2000. The Redstone Title Commitment and the Johnson Title Commitment are herein collectively called the "Title Commitments", and are attached hereto as **Exhibit "A"** and incorporated herein. As used herein, the term "Unacceptable Encumbrances" shall mean all Encumbrances, save and except the Permitted Encumbrances. The Unacceptable Encumbrances specifically include, without limitation, (a) all of the matters set forth in the Title Commitments, including those matters set forth in Schedules B and C to the Title Commitments, but expressly excluding the Permitted Encumbrances, (b) all leases and other rights of

occupancy in favor of EDCCI or any other party, (c) all rights and other interests (including possessory rights) of any party holding under EDCCI, including without limitation, all subtenants, licensees, employees, agents, officers, directors and shareholders of EDCCI and all members of the golf club EDCCI has been or is operating on a portion of the Property, (d) any homestead or other claims or interests of Noble C. Ginther, Jr. or Amber Ginther, (e) any interests or claims of Fergus M. Ginther and Adriana Ginther and (f) all property, maintenance and similar agreements. Debtor's conveyance of full fee simple title to the Property (including both the surface and mineral estates) to Redstone Acquisition by Debtor on its own behalf and on behalf of all of the Co-Interest Owners shall be free and clear of all Encumbrances (including the Unacceptable Encumbrances), except for the Permitted Encumbrances.

3. The Debtor is authorized and directed, both on its own behalf and on behalf of all of the Co-Interest Owners, to execute and deliver all documents and instruments necessary, appropriate or desirable to complete a sale of the Property (which includes the interests of the Debtor and the Co-Interest Owners in the Property) to Redstone Acquisition upon such terms and conditions as are described in, or contemplated by, the Sale and Purchase Agreement. Such documents and instruments include, but are not limited to, an instrument entitled "Special Warranty Deed, Easement, Assignment, Declaration of Restrictions and Other Agreements" ("Deed") in form acceptable to Debtor and Redstone Acquisition which, among other things, (i) is sufficient

to satisfy the requirements of Sections 5(b)(1) and 5(b)(2) of the Sale and Purchase Agreement, (ii) imposes the restriction on the portion of the Land Debtor and the Co-Interest Owners are retaining, such restriction being described in Section 8(b) of the Third Amendment, (iii) sets forth the agreement regarding Harris County Water Control and Improvement District No. 96 contemplated in Section 5(b)(1)(vii) of the Sale and Purchase Agreement (such subpart (vii) being created by Section 4 of the Fifth Amendment), and (iv) creates the access and utility easement referred to in Section 4 of the Sixth Amendment. All such documents and instruments (including the Deed) executed and delivered by the Debtor on behalf of the Co-Interest Owners shall be binding on such Co-Interest Owners to the same extent and with the same effect as if the Co-Interest Owners had themselves executed and delivered all such documents and instruments (including the Deed).

4. At the closing ("Closing") of the sale to Redstone Acquisition, all costs and expenses of the sale shall be paid out of the sales proceeds pursuant to the terms of the Sale and Purchase Agreement. In addition, at Closing, all ad valorem taxes on the Ranch through the date of Closing shall be paid out of the sales proceeds, including ad valorem taxes attributable to the interests of the Debtor and the Co-Interest Owners , but excluding any additional taxes arising because of changes in land usage or ownership (the ad valorem taxes payable out of the sales proceeds herein being called the "Ad Valorem Taxes"). Ad Valorem Taxes and other costs and expenses attributable to the interests of the

Appendix E

Debtor shall be paid out of the Debtor's portion of the Net Proceeds, and Ad Valorem Taxes attributable to the interests of each Co-Interest Owner shall be paid out of each respective Co-Interest Owner's share of the Net Proceeds. The requirement that Co-Interest Owners pay their pro rata portion of Ad Valorem Taxes shall not have any prejudicial effect on the Co-Interest Owners' right to bring a claim against Debtor's portion of the Net Proceeds from the sale for payment of current or past Ad Valorem Taxes. In no event shall any Co-Interest Owner have any claim against the Property.

5. The net proceeds ("Net Proceeds") of the sale of the Property shall consist of the proceeds of the sale, less (i) the costs and expenses of the sale, including but not limited to all costs and expenses to be paid by Debtor at Closing pursuant to the terms of the Sale and Purchase Agreement, but not including any compensation to the Debtor; and (ii) all Ad Valorem Taxes due and owing on the Ranch. All valid liens, claims and encumbrances against the Debtor are transferred to and shall attach to the Debtor's share of the Net Proceeds. All valid liens, claims, and encumbrances against any Co-Interest Owner are transferred to and shall attach to such Co-Interest Owner's share of the Net Proceeds except as provided in paragraph 14 below.

6. At Closing, the Net Proceeds of the sale shall be distributed as follows: that portion of the Net Proceeds of the sale attributable to Debtor's interest as reflected on the Title Commitments shall be paid by Charter Title Company to Debtor for deposit in an interest-bearing

and separate account at Southwest Bank of Texas, N.A. ("Debtor Net Proceeds Account") pending further Order of this Court; that portion of the Net Proceeds of the sale attributable to the interests of the Co-Interest Owners as reflected on the Title Commitments shall be deposited by Charter Title Company in a separate interest-bearing account pending distribution to the Co-Interest Owners as provided in this Final Judgment. No Co-Interest Owner shall receive any Net Proceeds until such Co-Interest Owner signs and delivers to Charter Title Company an affidavit pursuant to Section 1445 of the Internal Revenue Code in a form reasonably satisfactory to Redstone Acquisition. Each Co-Interest Owner who has delivered such affidavit to Charter Title Company will receive the Co-Interest Owner's share of the Net Proceeds plus accrued interest upon delivery of the affidavit unless an objection to such distribution has been filed with this Court (and a copy of such objection has been received by Charter Title Company, 700 Louisiana, Suite 3340, Houston, Texas, 77002, Attn: Mr. Garry L. Carr), or unless, in the opinion of Charter Title Company, there are unresolved defects, liens, or other matters that may affect title to the land or the interest insured. In the event an objection to the distribution of funds to a Co-Interest Owner is filed and received by Charter Title Company, or in the event that, in the opinion of Charter Title Company, there are unresolved defects, liens, or other matters that may affect title to the land or the interest insured, Charter Title Company is hereby authorized to retain any such funds in the interest-bearing account pending further Order of this Court as to the proper distribution of such funds or

to deposit such funds into the registry of this Court or if such deposit is refused by this Court, any other court of competent jurisdiction.

7. At the Closing of the sale to Redstone Acquisition, the Debtor shall pay to Tebear Investments, Inc., out of the Debtor's portion of the Net Proceeds, the sum of $75,000.00, representing the principal amount of Tebear Investment, Inc.'s claim, plus interest in the amount of $15,646.00, for a total payment of $90,646.00 (less $18.50 per day that the Closing funds prior to April 1, 2000 or plus $18.50 per day that the Closing funds after April 1, 2000). Upon payment by Redstone Acquisition of the $10,000,000.00 Purchase Price, Tebear Investments, Inc.'s lien on the Property shall be automatically released without the necessity of taking any further action; however, as Tebear Investment, Inc.'s claim exceeds such sum, Tebear Investment, Inc.'s lien is transferred to and shall attach to the Debtor's share of the Net Proceeds held in the Debtor Net Proceeds Account.

8. Notwithstanding the provisions of paragraph 6 above, at the Closing of the sale to Redstone Acquisition, Charter Title Company shall deposit that portion of the Net Proceeds attributable to the 3.125% interest in the Property held by the estate of Noble C. Ginther into an interest-bearing account at Southwest Bank of Texas, N.A. to be jointly controlled by the Debtor and Bobbie G. Bayless, Receiver. Such account shall be maintained so long as the receivership over certain assets established by Harris County, Texas, Probate Court No. 4, in Case

No. 231,749-405, styled *Elton M. Hyder, III, et al., v. NationsBank of Texas, N.A., et al.*, continues, and shall be held in that manner until any disputes concerning ownership have been resolved or otherwise decided by a court of competent jurisdiction.

9. Debtor is authorized to execute a letter authorizing Charter Title Company to not issue an owner policy of title insurance to Purchaser covering all of the Property, but rather to issue two owner policies of title insurance, one in favor of Redstone Acquisition covering a portion of the Property and one to Redstone Acquisition's purchaser covering the remaining portion of the Property; provided however, the total cost to Debtor and the other Co-Interest Owners for such owner policies of title insurance shall not exceed the cost which would have been incurred by Debtor and the Co-Interest Owners if one owner policy of title insurance in the amount of $10,000,000 had been issued to Redstone Acquisition covering all of the Property.

10. The Settlement Agreement is hereby approved. If and only if the Closing of the sale actually occurs, Redstone Acquisition is ordered to comply with its terms by paying at Closing $300,000 to Noble C. Ginther, Jr., and Amber Ginther, jointly, and by paying $100,000 to a segregated fund dedicated to severance pay for the employees of EDCCI. The payments by Redstone Acquisition are in addition to the $10,000,000 Purchase Price for the Property. No payments are due Amber Ginther from the Net Proceeds. If the Closing of the sale does not occur for any reason whatsoever, including but

not limited to default by Redstone Acquisition, no amounts will be payable by Redstone Acquisition to Noble and Amber Ginther under the Settlement Agreement.

11. The Debtor shall prepare and file a statement of the completion of the sale herein, including a description of any and all documents or instruments executed and delivered in connection therewith, and all proceeds received from such sale, and include a copy of a deposit slip showing the amount of Debtor's Net Proceeds placed in the Debtor's interest-bearing account described herein, a copy of a deposit slip showing the amount of the Co-Interest Owners' Net Proceeds deposited by Charter Title Company, and an accounting of any Net Proceeds not distributed to the Co-Interest Owners and the reason such Net Proceeds were not distributed. The Debtor shall serve a copy of such statement by mail on the United States Trustee, the Official Committee of Unsecured Creditors, all creditors, all Co-Interest Owners, all parties requesting notice, and any other parties claiming an interest in the Property, including all lienholders.

12. Any claims that might be made with respect to the Property, the Debtor, or the distribution of the Net Proceeds shall be asserted in this Court as part of this case.

13. Notwithstanding any other provision herein, this Order does not in any manner release, limit or affect the obligations of Redstone Acquisition as buyer to comply with all applicable law including, but not limited to,

local, state, and federal rules, regulations, statutes, permits and orders, pertaining to environmental requirements. The provisions of this item 13 are based on Redstone Acquisition's understanding that the Texas Natural Resource Conservation Commission ("TNRCC") is not presently aware of any environmental liabilities associated with the Ranch that are not related to releases from the underground petroleum storage tanks referred to in **Exhibit "F"** to the Purchase and Sale Agreement dated November 5, 1998 between The Ginther Trusts, A Texas Joint Venture, and Redstone Properties.

14. Nucorp, Inc. is the record owner of a 9.375% interest in the Property, as reflected by the Title Commitments, and has complete authority to sell or otherwise deal with such 9.375% interest in the Property, subject to (a) execution of the affidavit pursuant to Section 1445 of the Internal Revenue Code referred to in paragraph 6 above and (b) release of the deed of trust liens filed under Clerk's File Nos. S037324 and S339624 in the Official Public Records of Real Property of Harris County, Texas. Nucorp, Inc. shall receive distribution of such 9.375% interest in the Net Proceeds, subject to the provisions of paragraph 6 above, free and clear of all liens and free and clear of any lis pendens filed with respect to the Property. While this Final Judgment, the disbursement to Nucorp, Inc., and the findings of fact and conclusions of law set forth herein shall not have res judicata or collateral estoppel effect on Fergus Ginther's or Adriana Ginther's state law claims against Nucorp, Inc. or Don Davis, for purposes of this Final Judgment approving

the sale of the Property, this Final Judgment constitutes a final order of sale regarding the sale of the Property to Redstone Acquisition, notwithstanding any subsequent determination of Fergus Ginther's and/or Adriana Ginther's state law claims against Nucorp, Inc. and Don Davis.

15. Pursuant to Section 363(i) of the Bankruptcy Code, before consummation of the sale to Redstone Acquisition, any Co-Interest Owner, as identified on the Title Commitments, may purchase the Property for the sum of $10,000,000.00. It is anticipated that the sale to Redstone Acquisition shall close on a date which is on or after eleven days and on or before fourteen business days after the date of entry of this Final Judgment. The Debtor and Redstone Acquisition may extend the closing date by written agreement to a date which is twenty-one days after the date of entry of this Final Judgment. No further extensions may be made without the agreement of Noble and Amber Ginther and the approval of this Court.

16. This Final Judgment constitutes a final appealable judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure, as modified by Rule 9021 of the Federal Rules of Bankruptcy Procedure. This Final Judgment shall also be docketed in the Debtor's main bankruptcy case, being case No. 98-32663-H4-11, and shall represent final disposition of both the Adversary Proceeding and the Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. 363.

Appendix E

Dated: 3/1/00

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

Presented by:

s/ David P. McClain
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Attorney for Redstone Properties, LLC
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Appendix E

s/ John F. Higgins (signed by permission by JAC)
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s/ Joseph M. Hill
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Approved as to form:

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Attorney for Tebear Investments, Inc.

Appendix E

Approved as to Form Only:

s/ Hayden Burns
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Attorney for Amber Ginther and
Noble C. Ginther, Jr.

Approved as to Form except as to
Paragraphs 5 and 14:

s/ Berry D. Bowen
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Attorney for Fergus M. Ginther and
Adriana N. Ginther

Appendix E

Approved as to Form as to Paragraph 13 Only:

s/ Hal F. Morris
signed by permission
Edith Stuart Phillips
Hal F. Morris
Assistant Attorney General
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Facsimile: (512) 482-8341

Attorney for Texas Natural Resource
Conservation Commission

APPENDIX F — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ON MOTION TO DISMISS DATED AND ENTERED JUNE 24, 1998

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 98-32663
CHAPTER 11

IN RE:
THE GINTHER TRUSTS,
A TEXAS JOINT VENTURE

Debtor.

ORDER ON MOTION TO DISMISS

The Court has considered the Motion to Dismiss and for Sanctions filed by Elton M. Hyder, III, et al. and finds that the relief requested should be granted in part. The Court finds that the case should be dismissed unless the Petition and Schedules are amended within the time and in the manner ordered herein, but that sanctions should not be imposed. It is therefore,

ORDERED, that this case shall be dismissed without further order of the Court unless Debtor, on or before June 26, 1998: (a) amends the Petition, Schedules and Statement of Financial Affairs to provide that it is a joint venture composed solely of the Nobel C. Ginther Grantor Trust

a/k/a N.C. Ginther Grantor Trust; and (b) amends its Schedules and Statement of Financial Affairs to provide that the only property of the joint venture comprising Debtor's bankruptcy estate is its interests in or relating to the el Dorado Golf Club, Inc. and the real estate known as the "El Dorado Ranch" described in Debtor's existing Schedules as "undivided interest in approximately 2,033 acres of real property located in Harris County, Texas." It is further,

ORDERED that no other property, whether listed in the Debtor's existing Schedules or otherwise, is property of the Debtor's bankruptcy estate or subject to the automatic stay pursuant to 11 U.S.C. § 362. It is further,

ORDERED that the Debtor shall have the exclusive right to file a plan of reorganization up to and including September 9, 1998, and, if the Debtor files a plan within such exclusive period, the Debtor shall have the exclusive right to seek confirmation of a plan up to and including November 6, 1998. It is further,

ORDERED that the deadline for filing Proofs of Claim shall be extended to and expire on July 31, 1998. It is further,

ORDERED that a special meeting of creditors pursuant to 11 U.S.C. § 341 shall be July 15, 1998 at 1:30 p.m. at 515 Rusk, Room 3401, Houston, Texas 77002. It is further,

ORDERED that the Clerk of Court shall serve a copy of this Order on all creditors and parties in interest listed on the mailing matrix or who have file notices of appearance in this case.

Appendix F

SIGNED on June 24, 1998.

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

APPROVED AS TO FORM:

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ATTORNEY FOR MOVANTS

David P. McClain, P.C.

s/ David P. McClain
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ATTORNEY FOR THE GINTHER
TRUSTS, A TEXAS JOINT VENTURE

Appendix F

s/ Nancy Holley
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ATTORNEY FOR THE UNITED STATES TRUSTEE

APPENDIX G — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION AFFIRMING "ORDER RESCINDING ORDER" AND "ORDER DISPERSING FUNDS" DATED JANUARY 3, 2001 AND ENTERED JANUARY 4, 2001

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-1691

FERGUS M. GINTHER and ADRIANA N. GINTHER

Appellants,

versus

CHARTER TITLE COMPANY; NUCORP, INC.; and DON J. DAVIS

Appellees.

ORDER

Pending before the Court is an appeal by Appellants Fergus M. Ginther and Adriana N. Ginther ("Ginthers") of three orders of the United States Bankruptcy Court for the Southern District of Texas ("bankruptcy court") dated April 10, 2000: first, an "Order Depositing Interpleader Funds Into the Registry of the Court in an Interest-Bearing Account': second, an "Order Rescinding Order"; and third, an "Order Dispersing Funds." Having considered the parties'

submissions and the applicable law, the Court finds that the orders of the bankruptcy court should be **AFFIRMED**.

I.

On March 11, 1998, The Ginther Trusts ("Debtor") filed a voluntary petition for bankruptcy relief. The bankruptcy court held a trial on January 27, 2000, to consider a motion by the Debtor to sell its 51% property interest in the El Dorado Ranch located in Harris County, Texas. In an order dated march 1, 200, the bankruptcy court held that Nucorp, a co-owner of the El Dorado Ranch was entitled to a 9.375% interest in the net proceeds of the sale of the property (Instrument No. 19, Ex. 1 at 13). In addition, the court ruled that appellee Don J. Davis ("Davis"), a majority shareholder in Appellee Nucorp, Inc. ("Nucorp"), would receive $350,000.00 pursuant to a previously arranged fee agreement. The sale of the El Dorado Ranch closed on March 23, 2000. Appellee Charter Title Company ("Charter") handled the closing of the sale.

On March 3, 2000, following the bankruptcy court's final judgment, the Ginthers sent a letter to Charter expressing their objection to the disbursement of any proceeds to Nucorp or Davis. The letter requested that Charter "either retain the funds in an interest bearing account or deposit any funds or proceeds otherwise to be disbursed to Don J. Davis or NuCorp, Inc. from the [property] sale [ ] into the registry of the Bankruptcy Court or the registry of the 270th District Court and interplead the claims of the Ginthers, Davis and NuCorp in that proceeding." (Instrument No. 18, Ex. 1(B), at 1). Consequently, on approximately March 27, 2000,

Charter filed an interpleader with the bankruptcy court and tendered the net proceeds of the property sale into the court's registry. (*Id.* Ex. 1, at 2).

On April 10, 2000, the bankruptcy court issued three orders, two of which are now the subject of the Ginthers' appeal. First, the bankruptcy court ordered that the interpleaded funds be deposited into the registry of the court in an interest-bearing account. (Instrument No. 18, Ex. 2). Second, the bankruptcy court then rescinded the previous order because "the funds ordered interplead into the Registry by Charter [ ] cannot be disbursed by the Clerk prior to a seven-day clearing period . . . [and] a more prompt disbursement is necessary under the circumstances and in light of its prior orders and judgment in this case." (*Id.* Ex. 3). Third, the bankruptcy court ordered that the interpleaded funds be endorsed to Joseph M. Hill, the attorney for Nucorp and Davis. Upon receipt, Hill was ordered to disburse the funds to Nucorp and Davis.

On April 19, 2000, in an emergency proceeding requested by the Ginthers, Judge Lynn N. Hughes of the United States District Court for the Southern District of Texas denied the Ginthers' motion to stay the bankruptcy court's April 10, 2000, disbursement order pending appeal. (Instrument No. 12). Pursuant to Judge Hughes' order, the Ginthers' filed their appellate brief on April 26, 2000. (Instrument No. 16). In their appeal, the Ginthers contend that the bankruptcy court did not have jurisdiction over Charter's interpleader because it did not implicate "the debtor, its estate[,] or the administration thereof." (*Id.* at 4). The Ginthers also argue that the bankruptcy court's orders

deprived them of due process of law because they "were entitled to have their claim heard as in an ordinary civil action." (*Id.* at 5). Finally, the Ginthers contend that this Court has original jurisdiction over the interpleader. That is, according to the Ginthers, the interpleader "arises" under 28 U.S.C.A. § 1335 (2000).

Nucorp and Davis filed their brief on April 28, 2000. (Instrument No. 20). They maintain that the bankruptcy court's orders "were entered merely to enforce the [bankruptcy court's] prior ruling. As such, there was nothing new in those orders, and nothing that [the] Ginther[s] could separately appeal." (*Id.* at 5). Nucorp and Davis next argue that under section 363(j) of the Bankruptcy Code the bankruptcy court was authorized to make a determination of the rights of co-owners of property sale proceeds. In any event, according to Nucorp and Davis, the bankruptcy court had ancillary jurisdiction over the interpleader because the proceeds of the property sale had a direct relation to property or assets of the Debtor. Finally, Nucorp and Davis assert that the Ginthers are estopped from challenging the proceeds distribution because, following the bankruptcy court's final judgment, the Ginthers sought relief in state court. They contend that the issue has "already been fully considered and rejected by the state court."

II.

The district court review *de novo* the decisions of the bankruptcy court on matters of law. *See In re Mendoza*, 111 F.3d 1264, 1266 (5th Cir. 1997). Bankruptcy court findings of fact are reviewed under the clearly erroneous standard.

See Fed. R. Bankr. P. 8013. However, a finding of fact premised on an improper legal standard or on a proper legal standard that is improperly applied "losses the insulation of the clearly erroneous rule." *See In re Missionary Baptist Found. Of Am.*, 818 F.2d 1135, 1142 (5th Cir. 1987).

III.

The Ginthers contend in this appeal that the bankruptcy court was without jurisdiction to entertain the interpleader filed by Charter. Consequently, the Ginthers maintain, the bankruptcy court's order directing the disbursement of the proceeds from the sale of the debtor property to Nucorp and Davis was improvidently issued. In contrast, Nucorp and Davis assert that the bankruptcy court was merely enforcing the final judgment it rendered on March 1, 2000. According to Nucorp and Davis, the bankruptcy court's disbursement order was "entered merely to enforce [its] prior ruling. As such, there was nothing new in [the disbursement order], and nothing that [the] Ginther[s] could separately appeal." (Instrument No. 20, at 5).

The Court finds Nucorp and Davis' reasoning persuasive. The Ginthers' assertion that the bankruptcy court "should have adjudicated the competing claims prior to order dispersal," (Instrument No. 16, at 5), ignores the reality that the bankruptcy court approved Nucorp's share of the proceeds in the March 2000 final judgment. In that judgment, the bankruptcy court held that "Nucorp, Inc. is the record owner of a 9.375% interest in the Property as reflected by the Title Commitments and has complete authority to sell or otherwise deal with such 9.375% interest in the Property."

(Instrument No. 19, Ex. 1, at 13). The bankruptcy court also ruled that "this Final Judgment constitutes a final order of sale regarding the sale of the Property . . . notwithstanding any subsequent determination of [the Ginthers'] state law claims against Nucorp, Inc. and Don Davis." (*Id*).

Ironically, although the Ginthers now object to the bankruptcy court's jurisdiction over Charter's interpleader, that proceeding was precisely the course of action they recommended to Charter. In a letter dated two days after the bankruptcy court's final judgment, the Ginthers' attorney asserted an interest in the proceeds and requested that Charter "either retain the funds in an interest bearing account or deposit any funds or proceeds otherwise to be disbursed to Don J. Davis or NuCorp, Inc. from the [property] sale [ ] into the registry of the Bankruptcy Court . . . and interplead the claims of the Ginthers, Davis and NuCorp in that proceeding." (Instrument No. 18, Ex. 1(B), at 1). In short, the Ginthers desire to have their cake and eat it too.[1] In likely anticipation that Charter would seek to avoid liability arising from its disbursement of the proceeds, the Ginthers suggested an interpleader in order to set the stage for an otherwise untimely appeal of the bankruptcy court's final judgment issued on March 1, 2000.

The Ginthers correctly noted in their March 3, 2000, letter to Charter that pursuant to the bankruptcy court's final

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1. This aphorism stems from the writings of English author John Heywood. Originally, the adage was expressed as: "Would ye both eat your cake and have your cake?" This and other colloquial English phrases were first printed in *The Proverbs of John Heywood* in 1546.

judgment, they were entitled to object to the distribution for the sale proceeds. In the final judgment however, the bankruptcy court clearly ruled that it would be the forum to address any objections. According to the bankruptcy court:

> In the event an objection to the distribution of funds to a Co-Interest Owner is filed and received by Charter [ ], . . . Charter [ ] is hereby authorized to retain any such funds in the interest-bearing account *pending further Order of this Court as to the proper distribution of such funds* or to deposit such funds into the registry of this Court, or if such deposit is refused by this Court, any other court of competent jurisdiction.

(Instrument No. 19, Ex. 1, at 11) (emphasis added).

Indeed, the bankruptcy court's April 10, 2000, order disbursing the funds awarded in this final judgment represents its enforcement of the March 2000 final judgment. *See In re Chateauguay Corp.*, 201 B.R. 48, 62 (Bankr. S.D.N.Y. 1996) (holding bankruptcy courts have "Inherent jurisdiction to interpret and enforce its own orders and to determine disputes"); *see also In re Paris Indus. Corp.*, 132 B.R. 504, 508 (Bankr. D. Maine 1991) (holding that bankruptcy courts have the authority to "enforce prior orders and 'secure or preserve the fruits and advantages of a judgment or decree rendered therein. . . . The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause . . ."). Although it was the result of an interpleader, the bankruptcy court's order merely reiterated the final judgment. Accordingly, the Ginthers' true

means of redress of the bankruptcy court's decision to grant part of the proceeds to Nucorp and Davis was through a direct appeal of the final judgment, not of the April 2000 disbursement order.

IV.

Based on the foregoing, the Court finds that the bankruptcy court's orders dated April 10, 2000, should be **AFFIRMED**. The Court additionally finds that, because any further appeals would be frivolous, this Order should not be stayed.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 3rd day of January, 2001, at Houston, Texas.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DENYING MOTION FOR STAY PENDING APPEAL DATED AND ENTERED APRIL 11, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

MC ACTION H-00-110

Ginther

versus

Charter Title

CONFERENCE MEMORANDUM

Date: 4-18-00

* * *

At the conference, these rulings were made:

(1) Motion for stay is denied (1).

(2) Ginther has until noon on April 21 to abandon in claim.

(3) If Ginther persists in its claim, Ginther must file a brief by April 19, 2000.

(4) Defendants must respond by April 21, 2000.

APPENDIX I — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DISPERSING FUNDS DATED AND ENTERED APRIL 10, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 98-32663-H4-11

IN RE:
THE GINTHER TRUSTS

DEBTOR

ADV. NO: 99-3058

THE GINTHER TRUSTS

Plaintiff

v.

NOBLE C. GINTHER, JR., ET AL and CHARTER TITLE COMPANY

Defendants

ORDER DISPERSING FUNDS

In accordance with the court order allowing Charter Title Company to place funds in Court's registry in the respective

amounts of $511,405.56, $350,000.00, and $224,352.38, it is hereby ORDERED

1. The Clerk of Court is authorized to endorse the above-referenced checks to Joseph Hill.

2. Upon receipt, Joseph Hill is Ordered to dispense the funds to the following entities:

   A) De Lange, Hudspeth, McConnell & Tibbets, L.L.P. in the amount of $4,856.00;

   B) Nucorp, Inc. in the amount of $509,129.84;

   C) Don J. Davis in the amount of $223,334.47; and

   D) Don J. Davis in the amount of $348.427.63.

3. Within 10 days of the entry of this order, Joseph Hill is directed to file a certificate certifying that the above-referenced disbursements were made in accordance with this Order.

Signed this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY JUDGE

APPENDIX J — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION RESCINDING ORDER DATED AND ENTERED APRIL 10, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 98-32663-H4-11

IN RE:
THE GINTHER TRUSTS

DEBTOR

ADV. NO: 99-3058

THE GINTHER TRUSTS

Plaintiff

v.

NOBLE C. GINTHER, JR., ET AL and CHARTER TITLE COMPANY

Defendants

ORDER RESCINDING ORDER

This matter came before the Court on April 10, 2000. At that hearing, the Court signed an Order Depositing

Appendix J

Interpleader Funds into Registry of the Court in an Interest-Bearing Account. Subsequent to that hearing, the Order was entered by the Clerk's Office.

The Court has now learned that the "original Order Depositing Interpleader" was entered improvidently. It has come to the Court's attention that the funds ordered interplead into the Registry by Charter Title cannot be disbursed by the Clerk prior to a seven-day clearing period. It is the Court's conclusion that a more prompt disbursement is necessary under the circumstances and in light of its prior orders and judgment in this case. Consequently, by separate form of order, the Clerk shall be authorized to receive from Charter three checks in the amounts recited and to endorse them in favor of Joseph M. Hill, who shall in turn be given specific disbursement instructions by the Court. The foregoing tender to the Clerk for endorsement shall constitute sufficient compliance with this Court's order for Charter to "pay into the Registry" for interpleader purposes.

Therefore, for good cause found, it is hereby ORDERED that the Order Depositing Interpleader Funds into Registry of the Court in an Interest-Bearing Account is rescinded.

Signed this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX K — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DEPOSITING INTERPLEADER FUNDS INTO THE REGISTRY OF THE COURT IN AN INTEREST-BEARING ACCOUNT DATED AND ENTERED APRIL 10, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. 98-32663-H4-11
(CHAPTER 11)

In re:
THE GINTHER TRUSTS,
a Texas joint venture,

Debtor

ADVERSARY NO. 99-3058

THE GINTHER TRUSTS,
a Texas joint venture

Plaintiff

VS.

NOBLE C. GINTHER, JR., ET AL

Defendants

Appendix K

ORDER DEPOSITING INTERPLEADER FUNDS INTO THE REGISTRY OF THE COURT IN AN INTEREST-BEARING ACCOUNT

On March 29, 2000, Defendant, Charter Title Company, filed with the Court its Motion for Interpleader, wherein it requested that the funds held by it be deposited into the registry of the court. The Court, having examined such interpleader, and being of the opinion that such funds should be deposited in an interest-bearing account, it is ORDERED that the District Clerk place the funds interpled by Charter Title Company, in the respective amounts of $511,405.56, $350,000.00 and $224.352.38, totaling $1,085,757.94, into an interest-bearing account at an approved depository institution.

SIGNED this 10th day of April, 2000.

s/ William Greendyke
UNITED STATES BANKRUPTCY JUDGE

APPENDIX L — EXCERPTS FROM FIFTH AMENDED AND RESTATED REVOCABLE TRUST AGREEMENT DATED APRIL 7, 1989

FIFTH AMENDED AND RESTATED
REVOCABLE TRUST AGREEMENT

THE STATE OF TEXAS

COUNTY OF HARRIS

WHEREAS, NOBLE C. GINTHER and MINNIE LEE GINTHER (the "Grantors") created a revocable trust agreement on the 29th day of December, 1986, with NOBLE C. GINTHER as the Trustee (the "Trustee"), such revocable trust being known as the GINTHER REVOCABLE TRUST; and

* * *

NOW THEREFORE, the trust agreement, known as the Ginther Revocable Trust, as amended and restated by the First Amendment, Second Amendment, Third Amendment and Fourth Amendment is hereby amended and restated in its entirety for the fifth time ("Fifth Amendment") on this the 7th day of April, 1989 as follows, it being the express intentions of both of the Grantors that any revocation of such trust agreement heretofore attempted is wholly ineffective, null and void:

THIS FIFTH AMENDED AND RESTATED REVOCABLE TRUST AGREEMENT made and entered into this 7th day of April, 1989, between NOBLE C. GINTHER (the "Husband") and MINNIE LEE GINTHER (the "Wife"),

of Houston, Texas as Grantors (the "Grantors"), and NOBLE C. GINTHER , of Houston, Texas, as Trustee (the "Trustee").

ARTICLE I — BENEFICIARIES AND DISTRIBUTIONS

1.1 The trust initially created by this trust instrument shall be known as the "GINTHER REVOCABLE TRUST." The Trustee shall hold, manage, sell, exchange, invest and reinvest the trust property, collect all income and, after deducting such expenses as are properly payable, shall accumulate and distribute the income and principal as herein provided.

* * *

1.4 Following the death of the first Grantor to die (hereafter called the "deceased Grantor"), the Trustee shall divide all of the then remaining trust property into two separate shares, which may be unequal in value. One of such shares shall initially contain that portion of the trust property which constituted the community and separate property of the surviving Grantor (hereinafter called the "surviving Grantor"). This share, which shall be known by the name of the surviving Grantor (though hereinafter called the "surviving Grantor's Trust"), shall be held, administered and distributed as provided in Article II. The other share shall initially contain that portion of the trust property which constituted the community and separate property of the deceased Grantor. This share, which shall be known by the name of the deceased Grantor (though hereinafter called the "deceased Grantor's Trust"), shall be held, administered and distributed as provided in Article III.

* * *

Appendix L

ARTICLE II — SURVIVING GRANTOR'S TRUST

* * *

2.5 Upon the death of the surviving Grantor, any accrued but unpaid net income of the surviving Grantor's Trust shall be distributed to the surviving Grantor's estate and the remaining unappointed trust principal of the surviving Grantor's Trust (which remains after making any payments provided in section 2.4), together with all property received by the Trustee under the Will of the surviving Grantor and all other property received by the Trustee as the result of the death of the surviving Grantor, shall be added to the principal of the deceased Grantor's Trust to be held, administered and distributed as provided in Article III as a part of the deceased Grantor's Trust.

* * *

ARTICLE IV — TRUSTEE APPOINTMENTS

4.1 If the Husband resigns or otherwise ceases to act as Trustee, then the Wife and RIVER OAKS TRUST COMPANY shall immediately become Co-Trustees of all trusts created by this Trust Agreement. On the death of the first Grantor to die, the surviving Grantor and RIVER OAKS TRUST COMPANY shall immediately become Co-Trustees of all trusts created by this Trust Agreement to serve with any Trustee of Trustees then serving. Unless another meaning is clearly indicated or required by context of circumstance, the term "Trustee" shall mean and include any co-fiduciaries, alternates or successors.

* * * *